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ALEXANDER L. STEVAS,
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NO. 82-1730

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

GERALD LEN VOGEL,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT OF
CRIMINAL APPEALS OF ALABAMA

# BRIEF AND ARGUMENT IN OPPOSITION TO THE WRIT

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON III
ASSISTANT ATTORNEY GENERAL

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ATTORNEYS FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Where police officers observe a party committing the offense of littering and incident to informal questioning prior to arrest, the party states that he had been engaged in dumping trash before the officers arrived, do the officers have reasonable cause to arrest the party for littering and search his vehicle at the scene for evidence of littering?

2. Where officers have reasonable cause to believe that a party is violating the laws against littering and that the party's vehicle contains evidence of the same, does a belief on the part of the officers that the party is engaged in violation of the drug laws in addition to littering, limit the officers' authority to search the party's vehicle?

## PARTIES

In the Circuit Court of Montgomery County, Alabama, the Court of Criminal Appeals and Supreme Court of Alabama the parties were: Robert Louis Vogel, who is not a party herein; Gerald Len Vogel, who is Petitioner herein and the State of Alabama, which is Respondent herein.

The matters at issue here were first placed in issue in the Circuit (trial) Court and have been at issue throughout this litigation.

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## OPINIONS BELOW

The decision and opinion of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction is reported as follows:

Vogel v. State, 426 So. 2d 863 (Cr. App. Ala., 1980)

On September 18, 1981, the Alabama Supreme Court reversed the above opinion of the Court of Criminal Appeals of Alabama and held that the search of the Petitioner's vehicle was illegal under this Honorable Court's decision and opinion in Robbins v. California, (453 U.S. 520, 69 L. Ed. 2d 744, 101 S. Ct. 2841 [1981]). This September 18, 1981, decision and opinion of the Alabama Supreme Court was subsequently withdrawn and is not reported.

The decision and opinion of the Supreme Court of Alabama withdrawing its

September 18, 1981, decision and opinion and affirming the Court of Criminal Appeals' decision is reported as follows:

> Ex parte: Vogel; In re Vogel v. State, 426 So. 2d 882 (S. Ct. Ala., 1982)

## JURISDICTION

The Petitioner has invoked this Honorable Court's Jurisdiction under 28 U.S.C. 1257 (3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing an alleged claim under the Fourth and Fourteenth Amendments to the Constitution of the United States.

## STATEMENT OF THE CASE

Robert Louis Vogel and the Petitioner, Gerald Len Vogel, (hereinafter referred to as "The Vogels") were indicted for fourteen (14) separate violations of the Alabama Uniform Controlled Substances Act.[1] Title 20, Section 20-2-70(a), Code of Alabama, 1975. They were convicted in the Circuit Court of Montgomery County, Alabama, of eleven (11) different violations and appealed to the Court of Criminal Appeals of Alabama. Vogel v. State, 426 So. 2d 863, 866 (Cr. App. Ala., 1980)

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[1]They were each indicted in fourteen counts for possession of (1) Pethidine; (2) Methaqualone, (3) Cocaine; (4) Morphine; (5) Hydromorphone; (6) Ambarbital & Secobarbital; (7) Opium; (8) Methadone; (9) Amphetamine; (10) Ethylmorphine; (11) A preparation of opium; (12) Phenmetrazine; (13) Alphaprodine, and (14) Oxymorphone. (R. pp. 222-229) They were convicted under counts 1, 2, 3, 4, 5, 8, 9, 10, 12, 13 and 14. (R. pp. 244-245)

On October 28, 1980, the Honorable Court of Criminal Appeals of Alabama issued an opinion holding.

1. The searches of the Vogels' vehicle and duffle bags were lawful and

2. The violation of the Alabama Uniform Controlled Substances Act with regard to different substances in the same transaction constituted only one offense.

The Circuit Court's Judgment was affirmed in part and reversed in part. Vogel v. State, 426 So. 2d 863 (Cr. App. Ala., 1980).

Both parties applied for rehearing and certiorari. The Court of Criminal Appeals denied both Rehearing Applications, but the Honorable Supreme Court of Alabama granted both petitions. On September 18, 1981, the Supreme Court of Alabama issued its original opinion

in this case, finding the warrantless search of the Vogels' duffle bags illegal under Robbins v. California, (453 U.S. 420, 69 L. Ed. 2d 744, 101 S. Ct. 2841 [1981]) and reversing the decision of the Court of Criminal Appeals. (Vogel v. State, unreported, Mns. op. Sept. 18, 1981)

The State of Alabama applied for rehearing and, when this Honorable Court granted certiorari in United States v. Ross, (454 U.S. 891, 70 L. Ed. 2d 205, 102 S. Ct. 386 [1981]), suggested that the case be held in abeyance until a decision was rendered in Ross. On July 23, 1982, less than two months after this Honorable Court's decision in United States v. Ross, (____ U.S. ____, 72 L. Ed. 2d 572, 102 S. Ct. ____ [1982]), the Alabama Supreme Court granted rehearing, withdrew its September 18, 1981, opinion,

and affirmed the judgment of the Court of Criminal Appeals. Vogel v. State, 426 So. 2d 882 (S. Ct. Ala., 1983).

The State's second application for rehearing raising an unrelated state law issue was overruled on February 11, 1983. (Ibid.)

## STATEMENT OF THE FACTS

The following is a brief digest of the facts found by the Court of Criminal Appeals of Alabama.

On May 30, 1979, two Montgomery City Police Officers on routine patrol on Allenport Road noticed an automobile parked near an unused airstrip in a largely unpopulated area. As the officers approached the automobile, they observed two persons, later identified as the Vogels, doing something in the open trunk of their automobile.

Petitioner, Gerald Vogel was seen throwing a plastic bag to the ground, and Robert Vogel slammed the trunk shut in an obvious effort to keep the officers from seeing its contents. Incident to informal questioning prior to arrest, the Vogels stated that they had intended to illegally dump some trash but would not do so in the presence of the officers. The only trash observed by the officers was the bag discarded by Petitioner Gerald Vogel. There were signs prohibiting the dumping of trash in the area. Several new duffle bags filled with rectangular shaped objects were observed in open view in the back seat area of the Vogels' car. An inquiry at a nearby supply store revealed that the Vogels had just purchased these duffle bags as well as several others which were unaccounted for. Although the officers

arrested the Vogels for littering, they believed that the duffle bags contained either brick marijuana or stolen property which had arrived by or which was intended to be flown out from the air strip. An investigator summoned to the scene knew of Robert Vogel's reputation for involvement in drugs and stolen property. The Vogels were arrested and the vehicle was searched. The trunk was found to contain the unaccounted duffle bags. All of the duffle bags contained, not marijuana but stolen controlled substances. (Vogel v. State, 426 So. 2d 863, 866-871 [Cr. App. Ala., 1980])

## ARGUMENT

### THE OFFICERS HAD PROBABLE CAUSE TO SEARCH THE VOGEL'S VEHICLE.

If the officers in this case had probable cause[2] to search the Vogel's automobile, then they were authorized to open the trunk and the duffle bags. United States v. Ross, ____ U.S. ____, 72 L. Ed. 2d 572, 102 S. Ct. ____ (1982) Recognizing this, the Petitioner seeks to invalidate the search by attacking the events leading up to the arrest and search. The Petitioner seeks to apply the doctrine of "stop and frisk" and argues that the officers did not legally stop the Vogels.

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2"...[P]robable cause, that is, ...a belief, reasonably arising out of circumstances known to the seizing officer...." Carroll v. United States, 267 U.S. 132, 149, 69 L. Ed. 543, 549, 45 S. Ct. 280 (1925), quoted with approval in United States v. Ross, ____ U.S. ____, 72 L. Ed. 2d 572, 581, 102 S. Ct. ____ (1982)

The officers did not stop the Vogels at all; they were already stopped. The officers did approach the Vogels in a public place but in so doing the officers did nothing that any citizen was not authorized to do. Before the officers reached the spot, they observed Petitioner Gerald Vogel discard a plastic bag. Thus, the officers had not merely "reasonable suspicion" that unlawful littering was afoot but had actually seen it in progress. Although they were authorized to do so, the officers did not arrest the Petitioner or his brother at that point.[3] They made informal inquiries of the brothers and were advised that the Vogels were engaged in dumping trash. An admission against

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[3]There is, of course, no right to be arrested. Hoffa v. United States, 385 U.S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966)

interest even by a third party justifies belief in the matter asserted. United States v. Matlock, 415 U.S. 164, 176-177, 39 L. Ed. 2d 242, 252-253, 94 S. Ct. 988 (1974); United States v. Barfield, 507 F. 2d 53, 58 (5th Cir., 1985); United States v. Goley, 502 F. 2d 182, 186 (8th Cir., 1974) Therefore, the officers had probable cause to arrest both brothers for illegal littering.

Now if the Vogels were dumping trash as they claimed, the trash had to be in their automobile, since there was no place else it could be. Therefore, the officers had probable cause to search the car, all of its compartments and containers for evidence of littering. United States v. Ross, above.

But, argues the Petitioner the officers suspected the presence of drugs. A search may not be based on suspicion,

but it is difficult to see how a search, which is legal because of probable cause to believe that "x" is present, becomes illegal if the presence of "y" is suspected in addition to "x". It must also be observed that these officers had probable cause to search for drugs.

The Vogels were parked near a seldom used air strip, suitable for illegal drug traffic. They acted in a furtive manner as though they had something to hide, yet readily admitted illegal trash dumping. They had purchased new duffle bags and filled them with something. That "something" had the shape of brick marijuana and was not likely to be trash. This, coupled with Robert Vogel's reputation, would have provided a magistrate with sufficient probable cause to issue a warrant for the automobile and especially the duffle bags. Therefore,

the officers were authorized to conduct such a search under United States v. Ross, ____ U.S. ____, 72 L. Ed. 2d 572, 594, 102 S. Ct. ____ (1982)

The decisions and opinions of the Alabama Courts are entirely consistent with those of this Honorable Court.

## CONCLUSION

In conclusion the State of Alabama, Respondent, respectfully submits that the decisions and opinions of the Alabama Courts are patently correct and entirely consistent with the decisions of this Honorable Court and that the writ is due to be denied and the Respondent prays such denial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Respondent, do hereby certify that on this _____ day of_____, 1983, I did serve the requisite number of copies of the foregoing on the Attorney for Gerald Len Vogel, Petitioner, by mailing same to him, first class postage prepaid and addressed as follows:

Hon. Frank W. Riggs
Attorney at Law
P. O. Box 1047
Montgomery, Alabama 36102

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL